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IN THE

Supreme Court of the United States

October Term, 1985

NORMAN G. OWENS, Superintendent
Indiana Reformatory,

Petitioner,

v.

JACK RINER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has decided this case in a way in conflict with controlling decisions of this Court, prevailing federal circuit court decisions and the decision of the Supreme Court of Indiana: 1) by improperly finding cause and prejudice excusing a state procedural default of a confrontation claim; and 2) by failing to recognize that any error was harmless beyond a reasonable doubt.

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Petitioner, Norman G. Owens, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), entered in cause number 83-1627 on June 14, 1985, which reversed the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

OPINIONS BELOW

The Opinion of the Seventh Circuit issued on June 14, 1985, is reported at 764 F.2d 1253, and a copy of said Opinion is appended hereto at page A-4. The Entry and Judgment of the District Court, which was entered on March 3, 1983, has not been officially reported. A copy of said Entry and Judgment is appended hereto at page A-28. The decision of the Indiana Supreme Court resulting from Riner's direct appeal is reported at 281 N.E.2d 815 (Ind. 1972). The decision of the Indiana Supreme Court, which dealt with Riner's confrontation claim, is reported at 394 N.E.2d 140 (Ind. 1979) and is appended hereto at page A-36.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(a) and Rule 17.1(a) of the Rules of this Court, to review a decision of a federal court of appeals that has decided a federal question in a way in conflict with a state court of last resort, the federal circuit courts and controlling decisions of this Court.

The decision of the Seventh Circuit was entered on June 14, 1985. On June 26, 1985, the Petitioners herein were allowed until July 19, 1985, to file a Petition for Rehearing. Said Petition for Rehearing of Respondents-Appellees (Petitioners in this Proceeding), Suggestion for Rehearing in Banc, and Appendix was timely filed on July 19, 1985. The Seventh Circuit denied present Petitioner's Rehearing Petition on September 17, 1985. This petition is timely filed in that it is filed within ninety (90) days of the denial of the Petition for Rehearing and prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Sixth Amendment to the Constitution of the United States provides as follows:

> **Rights of the accused.** — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. §2254(a) provides in relevant part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

At the time of Riner's prosecution, the Indiana Code Annotated §9-102 (Burns 1956) provided as follows:

> **Accessory before the fact.** — Every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire, command, or otherwise procure a felony to be committed, may be charged by indictment, or affidavit, tried and convicted in the same manner as if he were a principal, either before or after the principal offender is charged, indicted or convicted; and, upon such conviction he shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from the reversal on appeal, by the Seventh Circuit, of a judgment by the District Court in

Riner v. Owens, Cause Number IP 82-444-C, in a habeas corpus case under 28 U.S.C. §2254.

B. Course of Proceedings Below

Jack Riner, the Respondent herein, and his uncle, Wayne Evans, were indicted for First Degree Murder on September 4, 1970, in connection with the murder of Edward M. Gibson during a burglary at Gibson's Trading Post in Hendricks County, Indiana, during the early morning hours of August 10, 1970 (R.4).[1] Jack Riner and Evans were jointly tried before a jury in the Morgan Circuit Court in December of 1970. The trial concluded on December 18, 1970, and both Riner and Evans were found guilty of First Degree Murder (R.115, 117). Riner and Evans were sentenced to life imprisonment (R.135, 139). Their convictions and sentences were affirmed upon direct appeal to the Indiana Supreme Court. *Riner v. State*, 281 N.E.2d 815 (Ind. 1972).

On March 29, 1973, Riner filed a petition for writ of habeas corpus in the United States District Court, Northern District of Indiana. This first habeas petition was denied on April 3, 1974. *Riner v. State*, 394 N.E.2d 140, 142 (Ind. 1979).

Jack Riner then began a state post-conviction relief proceeding on March 1, 1976. The Morgan Circuit Court issued detailed findings and conclusions and denied relief on September 24, 1976 (PCR. 88)[2] following an evidentiary hearing that had been conducted on September 18, 1976 (PCR. 134). Riner appealed the denial of post-conviction relief to the Indiana Supreme Court, and that Court affirmed the denial of relief. *Riner v. State*, *supra* (1979 opinion). More than two (2) years later, on February 20, 1982, Riner filed a Petition for Writ of Habeas Corpus in

[1] In this brief, "R" refers to the record of the original trial proceedings involving Petitioner, Indiana appellate number 8718225.

[2] In this brief "PCR" stands for the state record of the post-conviction proceedings state appellate number 2778146.

the United States District Court, Southern District of Indiana, No. IP 80-114-C (his second habeas petition). That Petition was dismissed without prejudice on March 9, 1982 for want of jurisdiction and for failure to exhaust state remedies under authority of *Rose v. Lundy*, 455 U.S. 509 (1982).

The third habeas application of Riner and the petition upon which this proceeding is based was filed on April 15, 1982. Two (2) issues were raised in the Petition, as follows:

(a) Petitioner was denied his Constitutional right to Confrontation. *Bruton v. United States*, 88 S.Ct. 1620.

(b) State of Indiana waived its waiver defense.

Following an order to show cause, the Petitioner (hereinafter referred to as "State" because the state is the real party in interest) filed a Response to Order to Show Cause on September 8, 1982. The state court records of Riner's trial and the post-conviction proceeding were subsequently filed on October 22, 1982. The District Court denied relief in an Entry and Judgment dated March 3, 1983. The District Court denied a certificate of probable cause on April 4, 1983. A certificate of probable cause was granted by the Seventh Circuit on April 9, 1984, and counsel was appointed to represent Riner.

The case was briefed and then orally argued before a panel of the Seventh Circuit on December 4, 1984. The Judgment of the Seventh Circuit was entered on June 14, 1985, and in its Opinion and Judgment, the Seventh Circuit panel reversed the District Court's decision. *See* Appendix, Page A-4. Subsequently, on November 5, 1985, the District Court conditionally granted a writ of habeas corpus pursuant to the determinations which were made by the Seventh Circuit and ordered that Riner should be released from custody if he was not retried within six (6) months of the date of the entry. *See* Appendix, Page A-1.

C. Facts Material to the Consideration of the Questions Presented

The facts relevant to the conviction of Jack Riner were succinctly set out in the opinion of the Indiana Supreme Court on Petitioner's direct appeal to that Court. The Indiana Supreme Court stated the facts, as follows:

> Edward Gibson and his brother Harold were owners of Gibson's Trading Post in Belleville, Indiana. Harold's home was about one mile southwest of the store and his brother, Edward, lived about a quarter mile due north. They both had burglar alarm monitors connected to the headboards of their beds. At three a.m. on the morning of August 10, 1970, Harold Gibson testified that he heard a loud noise over his monitor. He got out of bed and drove to the Trading Post after instructing his wife to call the Indiana State Police. He arrived on the west end of the store driveway, while his brother parked on the east end.
>
> Harold was shot in the leg as he started walking toward the store. He testified that he saw someone going over a fence and shot at the fleeing figure. He then proceeded to the front of the building and found his brother holding his gun and yelling that he had been hit. Harold then testified that he saw a man or boy running across the neighbor's yard and fired a few shots at him. He then saw a figure running across Road 40, got back into his car, drove across the road and got another glimpse of the man running behind a house. Harold Gibson testified that he could not identify the persons at the Trading Post that morning.
>
> Ronald Riner (brother of defendant Jack Riner and nephew of defendant Wayne Evans) testified as a state's witness. According to this witness, he had been riding around with Wayne Evans and his brother Jack Riner in Wayne Evans' car on the evening of the killing. Sometime in the early morning, they approached a little town outside Terre Haute. Ronald Riner testified that he was asleep in the back seat when the car stopped and defendant Evans got out.

> According to Ronald Riner, Evans went back to the trunk and removed a plastic bag. Evans then came by the car and asked Jack Riner if he would go with him. Ronald Riner stated that he then laid back down in the back seat. He heard some shooting and observed several cars pulling up at a building to his right. Ronald Riner got out of the car and noticed someone, who he believed to be Wayne Evans, running toward the car, who then turned east and went toward Plainfield. Ronald Riner testified that he was scared and ran into a field.
>
> Jack and Ronald Riner and their uncle, Wayne Evans, were thereafter apprehended by police officials making separate arrests in the general vicinity of the Trading Post within a few hours of the shooting.
>
> Ronald Riner further testified that Wayne Evans had related an account of the incident to him while they were confined in the Hendricks County Jail. The substance of that conversation, according to Ronald Riner, is that Wayne Evans stated that he had instructed Jack Riner to serve as a lookout while he attempted to force the door to the building. The cars of the Gibson brothers arrived at approximately the same time and that was when the shooting began. According to Ronald Riner, Wayne Evans related that he was shot at and returned the fire. He ran east and was confronted by another man (presumably Edward Gibson) who began firing at him. By this account, Wayne Evans then shot the man.

[*Riner v. State*, 281 N.E.2d 815, 816-817 (Ind. 1972)]. See also R.504-505, 528, 565-616, 643-644.

Edward Gibson died as a result of being shot after interrupting the burglary attempt which occurred at 3:00 a.m. on August 10, 1970 (R.528), and at least two men or a man and a boy were involved in the criminal incident (R.565-567, 569, 570, 602-605), although Harold Gibson was not able to positively identify the participants in the crime (R.611, 616).

Jack Riner was found and arrested about 1/2 mile east of the place of the crime, Belleville, on U.S. 40 at about 8:00 a.m. on August 10, 1970 (R.643-644). His trousers were wet from the knees down and his clothing was rumpled (R.643-644). Petitioner's co-defendant and uncle, Wayne Evans, was arrested at about 10:30 a.m. also on U.S. 40 (R.774-775).

The record also demonstrates that Ronald Riner personally observed prior to the attempted burglary that Wayne Evans had a long gun (rifle or shotgun) in the plastic bag that he got out of the trunk of his car because the gun was sticking out of the bag (R.822). The record also reveals that Ronald Riner saw Jack Riner get out of the car and leave with Evans when Evans asked Jack Riner to go with him (just prior to the shooting incident) (R.821). Evans and Jack Riner walked away from the car together (apparently toward the trading post) (R.821), and they went out of his sight (R.833).

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT IMPROPERLY REACHED THE MERITS OF RINER'S CONFRONTATION CLAIM BECAUSE RINER HAS NEVER SHOWN SUFFICIENT CAUSE OR ACTUAL PREJUDICE TO AVOID HIS STATE PROCEDURAL DEFAULT.

The Indiana Supreme Court found that under Indiana procedural rules Petitioner Riner waived his confrontation claim by failing to make a contemporaneous objection during trial (based on such a claim) and by failing to raise the confrontation issue on direct appeal. *Riner v. State*, 394 N.E.2d 140, 143-144 (Ind. 1979). It has been Riner's contention that a confrontation problem developed when the state prosecutor asked Ronald Riner about a conversation he had had with Wayne Evans when both

were incarcerated in the Hendricks County Jail after the criminal incident. The portion of the transcript relevant to this matter reads, as follows:

A. After you were in the Hendricks County Jail, did you at any time, have any conversation with a Mr. Wayne Evans?

A. Yes, sir.

Q. Approximately when was this?

A. Approximately 10 days to 2 weeks after this crime happened.

Q. And where did that conversation take place?

A. In one of the cells in Hendricks County Jail.

Q. And who was present?

A. There was several men in the cell, Wayne and I went off to one of the back cells.

Q. And what did he say to you, and what did you say to him?

MR. ERBECKER: Objection, as far as Jack Riner is concerned, Your Honor.

COURT: Objection sustained as far as Jack Riner. Admitted only as to Wayne Evans. You may answer now.

To which ruling of the court the State of Indiana excepts.)

A. I ask for an explanation as to what happened. At which time I was told.

Q. What did he tell you?

A. Hetold (*sic*) me that, him and Jack, was over to the building, he ask Jack if he would watch for him, that they were going to try an get into the building. He tried to force open a door, and continued doing so until he heard a car in front of the building. He went to look and there was some one running

toward the building and Jack hollored (*sic*) from the other side that, there was somebody over there. And they said that was when the shooting started.

Q. What did he specifically tell you, Ronald that happened?

A. He just said he was shot at, he shot back he fired several rounds from the ground on the west end of the building. In order to stop the man, then he ran east, from the back of the building. At which time he was confronted on the east end of the building by another man, he began firing at him, he ran across the street and fell, the man started running toward him, fired several rounds at him.

Q. You say, he? You mean Wayne Evans fired?

* * *

Q. The man that I understand that got killed was doing the firing at the time he fell. He fired several rounds at him, he said. He said he had no alternative, when he got up but to shoot the man, rather than the man to shoot him. At which time he shot twice at him, the man fell forward and he ran south on U.S. 39.

(R.827-830).

There is no doubt that there was no contemporaneous objection on confrontation grounds to Evans' hearsay statement that was elicited through Ronald Riner's testimony. Furthermore, it is obvious from a review of the Indiana Supreme Court opinion on Riner's direct appeal that no confrontation claim was raised on that appeal. *Riner v. State*, 281 N.E.2d 815 (Ind. 1972). For these reasons, the Indiana Supreme Court determined that the confrontation issue had been waived. *Riner v. State, supra*, at 143-144 (1979 opinion).

The now familiar rule in such a circumstance is that the state court waiver determination bars federal habeas consideration of Riner's confrontation claim unless he has

sufficiently established cause and actual prejudice to avoid the bar of his procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983). The fundamental problem with the decision of the Seventh Circuit is the dubious content which it has given to the "cause and prejudice" standard in light of the particular circumstances of this case. It is the State's contention that the Seventh Circuit found sufficient cause and actual prejudice when the legal/factual context mandated the opposite finding. Five Indiana Supreme Court justices, the District Court judge and the dissenter on the Seventh Circuit panel all concluded that there was no valid basis for avoiding the procedural default.

The District Court in its Entry essentially determined that the finding of a state procedural default barred review of the confrontation issue because Petitioner Riner had demonstrated no sufficient prejudice to avoid the procedural default. Entry, pp. 5-6. As pointed out by Judge Coffey in his well-reasoned dissent, the panel majority should have affirmed the District Court's finding that Phelps failed to demonstrate actual prejudice and should not even have discussed the cause component of the test, let alone reach the merits. The finding of actual prejudice by the panel majority flies squarely into the face of a record which can logically lead only to the conclusion that Phelps was not harmed by any technical violation of his confrontation right, as a matter of law. Just as significant and equally disturbing as a precedent is the interpretation of what may constitute cause. The State contends that the definition of cause created by the panel majority is contrary to *Wainwright v. Sykes*, *supra*, and could ultimately result in the emasculation of cause as a requirement in avoiding state procedural defaults in federal habeas corpus cases. The legal defects in the Seventh Circuit's definition of cause and its untenable finding of actual prejudice are briefly discussed, in turn, below.

A. The mere fact that an attorney represented a defendant and a co-defendant at a joint trial and then represented the defendant on the direct appeal cannot be considered as meeting the "cause" component of the Wainwright v. Sykes standard.

At page 7 of its decision (Appendix A-11), the Seventh Circuit panel states its "cause" holding as follows:

> We hold that dual representation of co-defendants at trial and representation of one or more of these defendants by that same attorney on direct appeal can meet the cause element of the cause and prejudice standard under certain circumstances.

While the Seventh Circuit initially appears to have circumscribed its holding to some extent by the use of the phrase "under certain circumstances" above, a careful reading of the panel's decision offers no suggestion that cause is anything other than automatic if the same attorney happened to represent the accused at trial and on appeal, at least in the dual representation context.

The Seventh Circuit holding is based on the mere "...possibility that the attorney might be inhibited from raising on appeal issues stemming from the defendants' conflicting defenses because to do so might cast doubt on the effectiveness or propriety of the attorney's dual representation at trial." Appendix, page A-11. It is very significant that the Court did not and could not conclude in this case that the record showed that Riner's attorney was actually inhibited from raising any issues at trial or on the appeal merely because the attorney also represented another co-defendant at the trial and on appeal. The Seventh Circuit also never found that there was any conflict in the defenses of the co-defendants.

The type of faulty reasoning employed by the Seventh Circuit in Riner's case was implicitly condemned by this Court in *United States v. Frady*, 456 U.S. 152 (1982). In discussing the contentions of the prisoner in *Frady* on the issue of prejudice this Court observed that:

> Contrary to *Frady's* suggestion he must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice,, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

Id., 456 U.S., at 170).

While this Court has not used the term "actual" when describing the cause standard as it has done when discussing prejudice, the impact of this Court's holdings is clear. Cause must also be based upon more than mere possibilities. *Wainwright v. Sykes* requires "a showing of cause for the noncompliance", 433 U.S. 72, 84, 87, not merely that there is an unproven possibility that joint representation of co-defendants at trial and on appeal might have affected an attorney's performance.

The possibilities standard for cause is patently contrary to the guidelines set forth for dual representation situations in *Holloway v. Arkansas*, 435 U.S. 475, (1978) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Holloway* and *Cuyler* require the showing of an actual conflict of interest, not merely a situation of dual representation. The reality is that the record does not support any conclusion that Phelps' attorney had any actual conflict of interest. No person ever suggested that there was any conflict of interest during the trial, and Jack Riner apparently knew prior to trial that he could have had a separate trial from his co-defendant, Evans (PCR 144).

Moreover, there was a reasonable, tactical basis for the limited objection made by Riner's counsel to the hearsay of his co-defendant. As noted by Judge Coffey, the dissenter on the Seventh Circuit panel, and as discussed in section B, *infra*, by the time the hearsay statement came before the jury, Jack Riner had already been established as the second person involved in the crime by his brother's testimony on personal knowledge. Without the hearsay statement, either Evans or Jack Riner might have been reasonably

considered as the triggerman. The hearsay statement merely made it clear that the triggerman was Evans, not Jack Riner. If anything, the hearsay statement served to mitigate Jack Riner's involvement while making Evans' the more culpable party. In addition, to the extent that the hearsay statement suggested that the store owners fired first, any mitigation would flow to Jack Riner as well as Evans. The fact that the hearsay statement indicated that Jack Riner had the limited role of lookout added nothing to the case against him. The fact that Jack participated in some manner in the crime was strongly established before the hearsay statement came into the record.

In addition, the admission of the hearsay statement did not create different strategic positions for Evans and Jack Riner. The statement merely defined the roles that they played. Ronald Riner's testimony based on personal observation had already made it clear that his brother and uncle both participated in the criminal undertaking. After all, they both left for the Gibson Trading Post with a plastic bag with a gun sticking out of it in the middle of the night, according to Ronald. Jack Riner went with his uncle, after he asked him to go (R.821) in circumstances where the only reasonable explanation for the request was assistance with a burglary. The jury had overwhelming evidence before it, excluding Evans' hearsay statement, that the result of Riner's and Evans' walk together that early morning was an aborted burglary and death. Counsel for Jack Riner has never demonstrated and the Seventh Circuit did not point out any actual conflict between Jack Riner's trial position and that of his uncle. It has certainly not been shown that the performance of defense counsel was affected by any alleged conflict. Thus, there was no violation of the principles announced in the *Cuyler* case due to dual representation. Logically, it must be concluded that Riner's procedural default was not actually caused by the dual representation.

The State recognizes that this Court has not given precise content to the term "cause." *Reed v. Ross*, 104 S.Ct. 2901,

2909 (1984). Yet, cause requires more than the merely possible. In *Reed v. Ross, supra*, 104 S.Ct., at 2909, it was stated that:

> Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, *Wainwright v. Sykes*, 433 U.S., at 91, and n. 14 97 S.Ct. at 2508, and n. 14; *Henry v. Mississippi*, 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct, *Wainwright v. Sykes, supra*, 443 U.S., at 89-90, 97 S.Ct., at 2507-2508; *Engle v. Isaac, supra*, 456 U.S., at 130, 102 S.Ct., at 1572.

The dual representation situation is not exceptional in and of itself.[3] Consequently, absent a showing of an actual conflict, the tactical decisions of presumably competent counsel in dual representation cases should not be considered as amounting to cause, even where the same attorney continues his representation through the direct appeal.

Furthermore, the panel's decision clearly extends beyond dual representation cases. The cause definition is ultimately stated very broadly when the panel concludes "...that identity of trial and appellate counsel can constitute sufficient cause to meet the first element of the cause and prejudice standard." (Appendix, A-12), because "...it would be most difficult if not professionally awkward to require a lawyer to argue on appeal his own ineffectiveness..." See Appendix, p. A-12. Thus, the Seventh Circuit suggests that "cause" exists whenever it might be professionally awkward for an attorney to raise an issue on appeal. In *Wainwright v. Sykes, supra*, and its

[3] *Bruton v. United States* 391 U.S. 123 (1968) was decided two years before Riner's trial so that the confrontation claim was available to competent counsel.

progeny, this Court has never held that cause could be found on such a tenuous basis. For example, in *Reed v. Ross, supra*, 104 S.Ct., at 2912 this Court concluded that "...Ross' claim was sufficiently novel in 1969 to excuse his attorney's failure to raise the *Mullaney* issue at that time." In *Reed*, there was a cause for the procedural default arising from unavailability of the issue to a reasonably competent attorney. It is a leap in logic from the unavailability of an issue to the professional awkwardness standard now enunciated by the Seventh Circuit. While there is always a "possibility" that an attorney who represented an accused at trial and on appeal might have covered up trial errors during the appeal because it could have reflected on his professional competency, there are often many tangible benefits in having the same attorney handle the direct appeal where he was trial counsel because he is already well versed in the case and may be aware of appealable errors that a new attorney might not readily discover from the cold record. Since it is apparent that the Seventh Circuit found cause based on possibilities rather than any actual, discernible failure of Riner's attorney, the decision of the Seventh Circuit is contrary to the precedents of this Court and indeed its own precedents. *See United States ex rel. Hudson v. Brierton*, 699 F.2d 917 (7th Cir. 1983); *United States ex rel Spurlark v. Wolf*, 699 F.2d 354 (7th Cir. 1983).

The majority opinion of the Seventh Circuit panel also misses the mark in another fundamental respect. The crucial factor in *Wainwright v. Sykes, supra*, was the failure of the criminal defendant to make a proper contemporaneous objection *at trial*. Under *Wainwright*, where there is a failure to make a proper contemporaneous objection at trial and the state court finds that the issue is waived as a result, it does not matter who the appeal attorney is. The matter actually turns on the procedural default at the trial and not on any failing of counsel on the subsequent appeal. In the case at bar there was no proper

contemporaneous objection at trial so that the issue was properly considered as waived at that point and there is no basis for concluding that a different direct appeal attorney would or could have avoided a state waiver determination. *See Riner v. State*, *supra*, at 143-144 (Ind. 1979). The definition of cause which was given birth by the Seventh Circuit emasculates that requirement in many habeas cases, because it is often routine for the same attorney to handle a trial and then the direct appeal. The Seventh Circuit may have had some liberty to give proper content to the cause standard but did not have the right to eliminate that requirement in a significant class of cases based on mere possibilities as opposed to a demonstration of a legitimate cause excusing the default arising from particular facts.

B. Riner has never shown the actual prejudice necessary to overcome his waiver of the confrontation claim.

In his dissent, Circuit Judge Coffey aptly explained why the "actual prejudice" conclusion of the majority is in error, noting that:

> The majority asserts that "[t]he petitioner was prejudiced because the admission of [Wayne Evans' jail cell] testimony was the only evidence before the jury of the petitioner's involvement in aiding and abetting the burglary and murder." From my independent review of the record, I am convinced that the jury was presented with more than sufficient evidence, before introduction of the jail cell conversation, to find, beyond a reasonable doubt, that Jack Riner aided and abetted in the burglary that resulted in Edward Gibson's death.

(Appendix, page A-25).

Judge Coffey properly and carefully analyzed all of the evidence in his dissent. His conclusion, that the admission of the hearsay statement concerning Jack Riner's

participation in the crime as a lookout was harmless, is compelled by the evidence, and the state urges the Court to carefully consider Judge Coffey's well reasoned dissent. *See* Appendix pages A-1 through A-27.

The majority on the Seventh Circuit panel simply ignored several crucial points which were established without contradiction in the record. The undisputed evidence (Harold Gibson, R.566-570, 602-605, 612) indicated that an attempted burglary and murder had occurred at the Gibson Trading Post at about 3:00 a.m. on August 10, 1970, and that at least two men or a man and a boy participated in the crime. *Riner v. State*, *supra*, at 816 (1972 opinion). Mr. Gibson could not identify the individuals who committed the crime (R.611, 616). The fact that both Wayne Evans and Jack Riner were involved in the attempted burglary and ultimate murder was clear from the testimony of Ronald Riner and the circumstances of their arrests following the crime. Ronald Riner, except where he indicated that he had spoken to either Jack Riner or Evans, made it clear that his testimony was based upon personal knowledge. His testimony, without contradiction in the record, shows that he, Evans and Jack Riner went for a drive, and in the early morning hours of August 10, 1970, Wayne Evans parked his car near Gibson's Trading Post in Belleville, Indiana (R.819-821). Jack and Evans had been in the front seat and Ronald Riner had been sleeping just prior to the stop in Belleville (R.820-821). Then, again from personal knowledge, Ronald Riner testified that Wayne Evans went to the trunk of the car and got a plastic bag with a gun (rifle or shotgun) sticking out of it (R.821-822). Evans asked Jack Riner to go with him (R.821). Petitioner Riner got out of the car and went with Evans (R.821). Evans and Jack Riner walked away from the car together, out of the sight of Ronald Riner (R.833). Ronald Riner laid down in the back seat of the car again and heard shooting after some cars arrived (R.823). In connection with the testimony of Harold Gibson and the various police witnesses that established that the Gibsons were shot after they

interrupted a burglary at their store, the testimony of Ronald Riner, as based on his personal knowledge, established that Jack Riner and Wayne Evans were the persons that Harold Gibson saw. From his personal knowledge, Ronald Riner made it very clear that the two (2) participants in the crime were Evans and the Petitioner.

The panel majority did not even mention the fact that Jack Riner got out of the car and walked away with his uncle toward Gibson's Trading Post after Evans asked Jack to go with him. Jack Riner had to know that Evans intended to commit a crime when he left the car with him. By going with Evans, Jack Riner demonstrated his intent to aid Evans. This is the only reasonable conclusion that can be reached, especially since we know that a burglary was attempted at Gibson's Trading Post a very short time later. The majority on the panel ignored the fact that Jack Riner fled from the scene of the crime which is further evidence of his involvement. *Note*, Judge Coffey's dissent, Appendix, pages A-20 and A-27. Finally, Ronald Riner's trial testimony is buttressed by the fact that shortly after the aborted burglary and murder, Ronald Riner told the police that "Jack Riner, my brother and Wayne Evans, my uncle," were the ones involved in the crime.

All of the testimony above from Ronald Riner came into the record before the jury heard the hearsay statement which merely identified Jack Riner as the lookout. The only reasonable inference that the jury could draw from Ronald Riner's testimony, even before the hearsay came into the record, was that Jack Riner was a participant in the crime, at the very least as a person who aided or abetted the commission of a felony. Indiana Statutes Annotated §9-102 (Burns 1956). The Seventh Circuit ignored this evidence which demonstrates that Jack Riner was a participant in the felony murder and finds significance in the, at most, corroborating hearsay comment that Jack Riner acted as a lookout, when such hearsay was clearly not a significant factor in his conviction, as appropriately recognized by

Judge Coffey. Because the record demonstrates that Jack Riner was not actually prejudiced by the hearsay as a matter of law, the Seventh Circuit should have affirmed the denial of a writ of habeas corpus.

II.

EVEN IF THE MERITS OF THE CONFRONTATION CLAIM COULD BE REACHED, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

For the same reasons that no actual prejudice was shown as discussed in Argument I(B) above, it is clear that any alleged violation of Riner's Sixth Amendment right to confront the witnesses against him should have been considered harmless error, assuming *arguendo* that the state procedural default or waiver could be overcome. This Court has made it clear that violations of *Bruton v. United States*, 391 U.S. 123 (1968), can and should be declared harmless where the circumstances so warrant. *Harrington v. California*, 395 U.S. 250 (1969); *Schneble v. Florida*, 405 U.S. 427 (1972). As in *Schneble*, the alleged *Bruton* error should have been declared as harmless beyond a reasonable doubt by the Seventh Circuit panel majority because the untainted evidence against Jack Riner was, in fact, strong and the alleged inadmissible evidence was merely corroborative. *See*, Dissent of Circuit Judge Coffey, Appendix, pages A-20 through A-27, Argument I and Facts Material to the Consideration of the Questions Presented in this Petition.

Ronald Riner's testimony on personal knowledge established that Jack Riner was one of the participants in the crime before the Evans' hearsay statement came into the record. The hearsay statement added nothing to the State's case against Jack Riner. The State's case against Riner would not have been "significantly less persuasive" in the minds of an average rational jury if Ronald's testimony concerning Evans' hearsay statement had been entirely excluded. Indeed, any impact of the statement so

far as Riner was concerned was probably lessened by the action of the state trial judge in sustaining the objection to the admission of the statement as to Jack and immediately instructing the jury that the hearsay statement was being admitted only as to Wayne Evans (R.828). Later, the trial judge also gave a general instruction (Final Instruction No. 25, R.88) that the jury should not consider those matters where objections were sustained. The hearsay statement did not contribute to or cause Riner's conviction. Ronald Riner's personal knowledge of what transpired did. The error here, if any, was harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JACK RINER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO.
	)	IP 82-444-C
NORMAN G. OWENS, Superintendent,	)	
Indiana State Reformatory,	)	
Pendleton, Indiana,	)	
	)	
Respondent.	)	

ENTRY

This matter is before the Court following the reversal of the Court's denial of the petition for writ of habeas corpus. The opinion and mandate of the Court of Appeals leaves to this Court the determination of the appropriate remedy to be applied. *See, Riner v. Owens*, 764 F.2d 1253 (7th Cir. 1985).

The petition was originally assigned to the late Honorable Cale J. Holder and is before the undersigned District Judge upon assignment by the Clerk of this Court.

It is clear from the opinion of the Court of Appeals that the petitioner is entitled to a new trial. The rule of *Sutton v. Lash*, 576 F.2d 738, 745 (7th Cir. 1978) governs herein and mandates remand to the Morgan Circuit Court, Morgan County, Indiana, for a new trial. *See, Pate v. Holhman*, 341 F.2d 764 (5th Cir. 1965).

Accordingly, the Court finds that the petitioner is entitled to the relief prayed for in his petition. The writ of habeas corpus is, therefore, GRANTED.

IT IS FURTHER ORDERED By the Court that:

1. The petitioner is to be remanded to the Morgan Circuit Court, being the 15th Judicial Circuit of the State of Indiana, Morgan County, Martinsville, Indiana, for the purpose of a new trial on the indictment herein.

2. The Morgan Circuit Court is hereby directed to vacate the judgment of conviction on the jury verdict in the matter of the *State of Indiana v. Jack Riner*, C 70 S 15 and the sentence imposed on the petitioner, Jack Riner, and to grant petitioner a new trial within six (6) months of the entry of this writ or he shall be fully and finally discharged from custody.

3. The respondent shall release the petitioner in accordance with the above provisions.

4. The Clerk of this Court is hereby directed to certify sufficient copies of this Order and deliver same to the United States Marshal and said Marshal is hereby ORDERED to effectuate service of said copies on the parties herein and upon the Clerk and Judge of the Morgan Circuit Court and the Prosecuting Attorney of the 15th (Morgan County) and 55th (Hendricks County) Judicial Circuits of the State of Indiana, at the expense of the United States.

Dated this 5th day of November, 1985.

S. HUGH DILLIN

S. HUGH DILLIN, *Judge*
United States District Court
Southern District of Indiana

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 17, 1985.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

JACK RINER,	)	Appeal from the
	)	United States
Petitioner-Appellant,	)	District Court for
	)	the Southern
No. 83-1627 vs.	)	District of Indiana,
	)	Indianapolis
NORMAN G. OWENS, Superintendent,	)	Division.
Indiana State Reformatory,	)	
	)	No. IP 82-444-C
Respondent-Appellee.	)	Cale J. Holder,
		Judge

ORDER

On July 19, 1985, respondent-appellee filed a petition for rehearing with suggestion for rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 14, 1985.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

JACK RINER,	)	Appeal from the
	)	United States
Petitioner-Appellant,	)	District Court for
	)	the Southern
No. 83-1627 vs.	)	District of Indiana,
	)	Indianapolis
NORMAN G. OWENS, Superintendent,	)	Division.
Indiana State Reformatory,	)	No. 82 444 C
	)	Judge Cale J. Holder
Respondent-Appellee.	)	

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this date.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 83-1627

JACK RINER,

Petitioner-Appellant,

v.

NORMAN G. OWENS, Superintendent,
Indiana State Reformatory,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 82-444-C — Cale J. Holder, *Judge*.

ARGUED DECEMBER 4, 1984—DECIDED JUNE 14, 1985

Before CUDAHY, COFFEY, and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. Petitioner Jack Riner appeals from the district court's denial of his petition for a writ of habeas corpus. Riner challenges his conviction for first degree murder on the ground that he was denied the right to confront and cross-examine witnesses against him. The state of Indiana contends that he waived his right to raise the confrontation issue on appeal as a result of his failure to raise the issue at trial or on direct appeal in the state courts. For the reasons set forth below, we reverse the denial of the writ of habeas corpus.

I.

The petitioner's conviction for first degree murder and sentence of life imprisonment arose from the events that transpired in the early morning hours of August 10, 1970, during the course of a burglary at Gibson's Trading Post near Belleville, Indiana. On that morning, Edward Gibson and his brother Harold Gibson, the co-owners of the trading post, drove to their store upon hearing an alarm in their homes, which was connected to the store's burglar alarm. The brothers positioned themselves at opposite ends of the store. As Harold started walking toward the store, he was shot in the leg. He testified that he proceeded to shoot at a fleeing figure going over a fence. When Harold went to the front of the store, he found his brother Edward holding a gun and yelling that he had also been shot. Upon seeing a man or boy running across a neighboring yard, Harold fired a few shots at the person. Harold saw a figure running across the road, got back into his car, drove across the road, and caught another glimpse of the man running behind a house. Harold was unable, however, to identify the persons that he had seen that morning. Edward later died as a result of the shooting.

Petitioner Jack Riner, a fifteen-year-old, his older brother Ronald, and their uncle Wayne Evans were charged with first degree murder as a result of the killing, which occurred during the course of a felony. The charges against Ronald Riner were subsequently dismissed. The petitioner and Evans were represented by the same attorney at their joint trial. Ronald testified as a state's witness at the trial, relating his version of the events on the morning of August 10, 1970, and recounting a conversation that he had had with Evans during their confinement in jail awaiting trial.

At the conclusion of the jury trial during which neither Evans nor the petitioner testified, both the petitioner and his uncle were convicted and sentenced to life imprison-

ment. The Indiana Supreme Court affirmed the petitioner's conviction on direct appeal in *Riner v. State*, 258 Ind. 428, 281 N.E.2d 815 (1972). The petitioner was represented on this appeal by the same attorney who had represented him and his uncle at trial. On March 29, 1973, the petitioner filed his first petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1982) in the United States District Court for the Northern District of Indiana. This petition was denied on April 3, 1974. On March 1, 1976, the petitioner filed a petition for post-conviction relief in state court, raising for the first time his claim that he had been denied the right to confront and cross-examine witnesses against him. His petition was denied on September 24, 1976. The Indiana Supreme Court affirmed the denial of post-conviction relief in *Riner v. State*, 271 Ind. 578, 394 N.E.2d 140 (1979). On February 20, 1982, the petitioner filed his second petition for a writ of habeas corpus, in the United States District Court for the Southern District of Indiana, but that petition was dismissed without prejudice for want of jurisdiction and for failure to exhaust state remedies.

On April 15, 1982, the petitioner filed *pro se* the present petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana. In this petition, the petitioner alleges that: (1) he was denied his right to confront witnesses in state court, (2) the confrontation issue was not raised at trial or on direct appeal because the petitioner's counsel had a conflict of interest due to his dual representation of the petitioner and Evans, and (3) the state waived its waiver defense by responding to the merits of the petitioner's claim in the state post-conviction proceeding. The district court denied the petitioner's request for relief on March 3, 1983. The district court held that while the petitioner had exhausted his state court remedies, he had failed to show the necessary cause and prejudice to overcome waiver of the confrontation claim by his failure to raise it at trial or on direct appeal.

On appeal, the petitioner asserts that his right to confront and cross-examine witnesses was denied in Indiana state court and that he has not waived his right to address the confrontation issue on appeal.

II.

A. Waiver of Right to Address Confrontation Issue on Appeal

According to 28 U.S.C. §2254(a), a state prioner is entitled to habeas corpus relief in a federal court only if he is being held "in custody in violation of the Constitution or laws or treaties of the United States." *Engle v. Isaac*, 456 U.S. 107, 119 (1982). Before determining whether a state prisoner's rights have been violated, however, a court must decide whether the prisoner has waived his claim for federal habeas corpus relief by failing to comply with such state procedural rules as those requiring a defendant to object at trial or to raise an issue on direct appeal. *Id.* at 126 n.28; *Williams v. Duckworth*, 724 F.2d 1439, 1442 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 143 (1984).[1] The Supreme

[1] A second procedural obstacle that might bar a state prisoner's habeas corpus petition in the federal courts is the argument that a prisoner has failed to exhaust state remedies. *Engle v. Isaac*, 456 U.S. 107, 126 n.28 (1982); *Perry v. Fairman*, 702 F.2d 119, 120 (7th Cir. 1983). According to the exhaustion requirement of 28 U.S.C. §2254(b), a district court cannot grant a writ of habeas corpus unless the petitioner has "exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1982); *Gray v. Greer*, 707 F.2d 965, 967 (7th Cir. 1983). In order to meet the exhaustion requirement, a petitioner must give the state courts the initial opportunity to address the particular federal constitutional claims. *Gray v. Greer*, 707 F.2d at 967. This requirement serves to minimize any potential conflicts between the state and federal courts. *Id.* The statute, however, does provide an exception to the exhaustion requirement in cases where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. §2254(b)(1982); *Gray v. Greer*, 707 F.2d at 967. Furthermore, the exhaustion requirement refers only to state remedies still available to the petitioner at the time that he files his federal habeas corpus petition. *Engle v. Isaac*, 456

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Court has observed that a federal court's decision whether to examine a state prisoner's constitutional claims when the prisoner has failed to abide by applicable state procedural rules implicates two types of concerns: (1) Congress's interest in providing a federal forum for the vindication of state prisoners' constitutional rights, and (2) the state's interest in the integrity of its procedural rules and in the finality of its judgments. *Reed v. Ross*, 104 S.Ct. 2901, 2907 (1984). The courts have noted that principles of comity require a state prisoner to present his claims to the appropriate state tribunal before seeking relief in federal court, thereby giving the state court the first opportunity to correct a constitutional violation. *See, e.g., United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 356 (7th Cir. 1983).

Although recognizing the state's interest in the integrity of its procedural rules, the Supreme Court has consistently held that federal courts have the power under 28 U.S.C. §2254 to look beyond a state procedural forfeiture in order to examine a state prisoner's claim that his constitutional rights have been violated. *Reed v. Ross*, 104 S.Ct. at 2907. The Court has held that when a procedural default by a state prisoner bars litigation of a constitutional claim in the state courts, the prisoner may obtain federal habeas corpus relief by showing cause for and actual prejudice from the default. *Engle v. Isaac*, 456 U.S. at 129; *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In formulating the cause and

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U.S. at 126 n.28; *Gray v. Greer*, 707 F.2d at 967. Since the Indiana Supreme Court denied Jack Riner post-conviction relief because he had waived his confrontation claim for purposes of the Indiana post-conviction process by not raising it at trial or on direct appeal, we affirm the district court's conclusion that he has exhausted his state remedies. *See Williams v. Duckworth*, 724 F.2d 1439, 1441 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 143 (1984) (since Indiana Supreme Court treats issues not raised on direct appeal as waived for purposes of Indiana post-conviction remedy, a petitioner need not raise those issues in a post-conviction petition or on an appeal from the denial of a post-conviction petition in order to exhaust his state remedies).

prejudice standard, the Court has declined to give the term "cause" precise content because of the numerous reasons for an attorney's failure to comply with a procedural rule and the limitless array of contexts in which a procedural default could occur. *Reed v. Ross*, 104 S.Ct. at 2909. The Court has noted that the terms "cause" and "actual prejudice" are not rigid concepts, but rather take their meaning from principles of comity and finality. *Engle v. Isaac*, 456 U.S. at 135. Thus, these terms may yield in cases in which it is necessary for a court to correct a fundamentally unjust incarceration. *Id.*

In the present case, the respondent argues that the petitioner Jack Riner waived his Sixth Amendment confrontation claim by failing to make a contemporaneous objection during trial and by failing to raise the confrontation issue on direct appeal. The petitioner did not raise the confrontation issue until he filed his petition for post-conviction relief. In examining his petition, the state circuit court held that the petitioner had waived the confrontation issue by not raising it on direct appeal. The circuit court also concluded that if the confrontation issue had been raised on direct appeal, the Indiana Supreme Court would likely have granted the petitioner a new trial based on a violation of the petitioner's Sixth Amendment right to confront witnesses under *United States v. Bruton*, 391 U.S. 123 (1968). Upon petitioner's appeal of the circuit court's denial of post-conviction relief, the Indiana Supreme Court concluded that the petitioner had waived his right to raise the confrontation issue in his petition for post-conviction relief under the Indiana post-conviction relief statute[2] by

[2] The Indiana Post-Conviction Relief Remedy Rules provide:

> All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent

(Footnote continued on following page)

not raising the issue at the time of the original trial or on direct appeal. *Riner v. State*, 271 Ind. 578, 581-82, 394 N.E.2d 140, 143-44 (1979). Since the petitioner has therefore waived his right to raise the confrontation issue in the Indiana courts by failing to raise the issue at trial or on direct appeal, we must determine whether the petitioner has shown cause for and actual prejudice from the default, thereby permitting us to overcome the waiver argument and to examine the petitioner's claim on the merits.

The petitioner claims that the confrontation issue was not raised at trial or on direct appeal because the same attorney represented him at both levels. We hold that dual representation of co-defendants at trial and representation of one or more of these defendants by that same attorney on direct appeal can meet the cause element of the cause and prejudice standard under certain circumstances. In a case where an individual is represented by the same counsel at both the trial and appellate levels, there exists the possibility that the attorney might be inhibited from raising on appeal issues stemming from the defendants' conflicting defenses because to do so might cast doubt on the effectiveness or propriety of the attorney's dual representation at trial. In several cases where a petitioner has been represented by different attorneys at trial and on appeal and where we have denied habeas corpus relief, we have hinted that the outcome of the case may have been different if the same attorney had represented the petitioner at both the trial and on direct appeal since the same attorney might be reluctant to raise issues on appeal that might suggest his ineffectiveness at trial. *United*

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petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.

Ind. Code Ann., Court Rules, Post-Conviction Relief, §8 (Burns 1984).

States ex rel. Devine v. DeRobertis, 754 F.2d 764, 766-68 (7th Cir. 1985); *Dently v. Lane*, 712 F.2d 1172, 1175-78 (7th Cir. 1983); *United States ex rel. Williams v. Franzer*, 687 F.2d 944, 950 n.11 (7th Cir. 1982). Since it would be most difficult if not professionally awkward to require a lawyer to argue on appeal his own ineffectiveness in not raising at trial issues relating to his dual representation, such as the confrontation question presented here, we conclude that identity of trial and appellate counsel can constitute sufficient cause to meet the first element of the cause and prejudice standard.

In addition to showing cause for his failure to comply with state procedural rules, the petitioner must also show actual prejudice suffered as a result of his failure to raise an issue at trial or on direct appeal. *Engle v. Isaac*, 456 U.S. at 129; *Wainwright v. Sykes*, 433 U.S. at 87. Although noting that it would not precisely define the terms "cause" and "prejudice," the Court in *Wainwright v. Sykes* held that the evidence presented at trial of the petitioner's guilt in that case was so substantial as to negate any possibility of actual prejudice resulting to the petitioner from the admission of his inculpatory statement. *Wainwright v. Sykes*, 433 U.S. at 87, 91. In the present case, we must determine whether the petitioner was prejudiced as a result of his attorney's failure to raise the confrontation issue at trial or on direct appeal, when the effect of that failure was the admission of Ronald's testimony as to his conversation with Evans in jail.

Ronald Riner testified as a prosecution witness at the joint trial of his brother and uncle. Based on his personal knowledge, Ronald related that he had been driving around with his uncle and brother in Evans's car in the early morning hours of August 10, 1970. Ronald stated that he had been sleeping in the back seat when the car stopped and Evans got out and walked back to the trunk. Ronald related that Evans removed a plastic bag from the trunk that had an object resembling the butt of a rifle sticking out of it and proceeded to ask Jack if he would go with him.

Ronald stated that he lay back down in the back seat until he heard some shooting and saw several cars pulling up to a building. Ronald stated that he got out of the car and saw someone, whom he believed to be Evans, running first toward the car and then toward the town of Plainfield. Ronald testified that he became frightened and ran into a field.

In addition to his testimony based on his personal knowledge, Ronald testified to a conversation that he had had with his uncle while in jail awaiting trial. Ronald testified that his uncle had told him that he had instructed Jack to be a lookout on the morning of August 10 while Evans tried to force open the door of the trading post. Ronald also testified that his uncle said that he had been shot at by someone and had returned the fire. Evans also told Ronald that as he was running east, he was confronted by another man who fired at him, and that Evans shot this man. Before Ronald testified as to that conversation with Evans, the defendants' attorney objected as to Jack Riner on unspecified grounds. The state trial court sustained the objection as to Jack Riner and admitted Ronald's subsequent testimony only as to Evans.[3]

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[3] The following exerpt from the trial transcript relates the questions that the state prosecutor asked Ronald Riner concerning his conversation with Evans in the county jail:

Q: After you were in the Hendricks County Jail, did you at any time, have any conversation with a Mr. Wayne Evans?
A: Yes, sir.
Q: Approximately when was this?
A: Approximately 10 days to 2 weeks after this crime happened.
Q: And where did that conversation take place?
A: In one of the cells in Hendricks County Jail.
Q: And who was present?
A: There was several men in the cell, Wayne and I went off to one of the back cells.
Q: And what did he say to you, and what did you say to him?
Defense Counsel: Objection, as far as Jack Riner is concerned, Your Honor.

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We hold that the admission of Ronald's testimony as to his conversation with Evans resulted in actual prejudice to the petitioner. The petitioner was prejudiced because the admission of this testimony was the only evidence before the jury of the petitioner's involvement in aiding and abetting the burglary and murder. For example, Evans stated to Ronald that Jack had served as a lookout for Evans, thereby providing support for the charge that Jack had facilitated the burglary and murder. In contrast to this damaging testimony, Ronald's personal testimony as to the events transpiring on August 10, 1970, merely revealed that Jack had been asked by his uncle to go with him, not that Jack had actively aided and abetted his uncle in the ensuing crimes. There was no direct evidence presented at

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Court: Objection sustained as far as Jack Riner. Admitted only as to Wayne Evans. You may answer now.

A: I ask for an explanation as to what happened. At which time I was told.

Q: What did he tell you?

A: He told me that, him and Jack, was over to the building, he ask Jack if he would watch for him, that they were going to try and get into the building. He tried to force open a door, and continued doing so until he heard a car in front of the building. He went to look and there was someone running toward the building and Jack holl[e]red from the other side that, that there was somebody over there. And they said that was when the shooting started.

Q: What did he specifically tell you, Ronald that happened?

A: He just said he was shot at, he shot back he fired several rounds from the ground on the west end of the building. In order to stop the man, then he ran east, from the back of the building. At which time he was confronted on the east end of the building by another man, he began firing at him, he ran across the street and fell, the man started running toward him, fired several rounds at him.

Q: You say, he? You mean Wayne Evans fired?

A: No, sir. The other man fired.

* * *

A: The man that I understand that got killed was doing the firing at the time he fell. He fired several rounds at him, he said. He said he had no alternative, when he got up but to shoot the man, rather than the man to shoot him. At which time he shot twice at him, the man fell forward and he ran south on U.S. 39.

trial that Jack was even aware of what his uncle was planning to do. Even Harold Gibson's testimony that he had seen two persons fleeing the scene following the shooting did not establish that one of those persons was Jack. Since Ronald himself testified that he had become frightened when the shooting began and had fled the scene, the fleeing persons that Harold Gibson had seen might easily have been Ronald and his uncle.

Furthermore, the objection by defense counsel on unspecified grounds to the admission of Ronald's testimony regarding his conversation with Evans was insufficient to reduce or eliminate the substantial prejudice that the petitioner suffered as a result of the admission of the testimony. As will be discussed below, the admission of this testimony was a clear *Bruton* violation. Thus, the judge's statement to the jury to disregard the testimony as far as Jack was concerned could not erase the extremely prejudicial impact that the statement might have had on the jury. In cases such as the present one where there is not substantial evidence apart from the excludable testimony to implicate a petitioner in a crime, the negative effect on the jury of the admission of the testimony and the resultant prejudice suffered by a petitioner cannot be eradicated.

In sum, we hold that the petitioner has shown both the cause and actual prejudice elements necessary to overcome his waiver of the confrontation issue in the state courts.

B. Violation of Right to Confront and Cross-Examine Witnesses under the Sixth Amendment

Since we have concluded that the petitioner has met the cause and actual prejudice standard, we will proceed to determine on the merits whether the petitioner has shown that his Sixth Amendment right to confront and cross-examine witnesses was violated. The petitioner argues that this right was violated when a statement made by a non-testifying co-defendant, with whom the petitioner was being jointly tried, was revealed to the jury.

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's conviction in a joint trial should be set aside when a co-defendant's confession inculpating the defendant is revealed through the testimony of a witness even though the trial court has instructed the jury to disregard the confession in determining the defendant's guilt or innocence. In *Bruton*, a postal inspector testified at the joint trial of two defendants that one of the defendants had confessed orally that he and his co-defendant had committed a robbery. *Id.* at 124. Although noting that the oral confession was legitimate evidence against the defendant who made it, the Court held that the introduction of the confession posed a substantial threat to the other defendant's Sixth Amendment right to confront witnesses against him, since the confessing defendant did not take the stand. *Id.* at 127-28, 137. The Court reasoned that an instruction by the trial court to disregard such a confession could not deflate the impact on the jury of such a powerfully incriminating extrajudicial statement. *Id.* at 135-36. The Court concluded that the unreliability of such a confession would be intolerably compounded if the alleged accomplice did not testify and thus become subject to cross-examination. *Id.* at 136.

In interpreting *Bruton*, we have held that the admission of a co-defendant's out-of-court confession violates a defendant petitioner's right of confrontation under the Sixth Amendment where the confession is vital to the government's proof of its case and directly implicates the defendant. *United States v. Key*, 725 F.2d 1123, 1125-27 (1984). In the present case, we hold that Jack Riner's right to confront and cross-examine witnesses against him was violated by the admission of Ronald's testimony as to his conversation with Evans even though the judge sustained defense counsel's objection to the testimony as to Jack. As in *Bruton*, the impact of the admission of the incriminating testimony on the jury could not be deflated by the trial

court's instruction to disregard the testimony as to Jack, especially when the testimony was the only evidence clearly implicating Jack as an aider and abettor of his uncle. Ronald's testimony as to Evans's statement was vital to the government's case and directly implicated Jack in the murder. In such a case, the admission of the prejudicial testimony is not harmless. *Cf. Harrington v. California*, 395 U.S. 250 (1969) (any violation of *Bruton* is harmless error where there is overwhelming evidence of the petitioner's guilt and the prejudicial impact of the co-defendants' statements is relatively insignificant). We hold that the admission of the testimony directly violated the petitioner's right to confront and cross-examine witnesses against him guaranteed by the Sixth Amendment.

In conclusion, the district court's denial of Jack Riner's petition for a writ of habeas corpus is reversed.

COFFEY, *Circuit Judge*, dissenting. The petitioner, Jack Riner, claims that his Sixth Amendment right to confront and cross-examine witnesses against him was violated when the prosecution elicited testimony of a jail cell conversation between Ronald Riner, the petitioner's brother, and Wayne Evans, the petitioner's uncle, implicating Jack Riner in the murder of Edward Gibson. Riner waived his Sixth Amendment claim by failing to raise the issue either at trial or on direct appeal to the Indiana Supreme Court. Nevertheless, the majority holds that Riner has demonstrated sufficient cause and prejudice to overcome this waiver and prevail on the merits of his Sixth Amendment claim. I dissent. The record clearly reveals that the State of Indiana introduced more than ample evidence at trial, independent of the jail cell conversation, to establish the petitioner's participation in the murder of Edward Gibson, beyond a reasonable doubt. Accordingly, I would hold that Jack Riner has failed to demonstrate the prejudice necessary to overcome the waiver of his Sixth Amendment claim.

I

On September 4, 1970, the Grand Jury of Hendricks County, Indiana, indicted the petitioner, Jack Riner, and his uncle, Wayne Evans, for first degree murder in connection with the shooting of Edward Gibson during an attempted burglary of Gibson's Trading Post in Belleville, Indiana. In December 1970, following a joint trial where Jack Riner and his uncle were represented by the same defense counsel, the jury returned a verdict of guilty against each defendant. At trial, Harold Gibson, the victim's brother; Ronald Riner, the petitioner's brother; and Virgil Ramp, the Hendricks County Deputy Sheriff who arrested Jack Riner, presented the testimony relevant to Jack Riner's conviction.

Harold Gibson testified that on August 10, 1970, at approximately 3:00 a.m., the burglary alarm sounded at Gibson's Trading Post, a general store in Belleville, Indiana, that was co-owned and operated by Harold and his brother Edward Gibson. Harold arose from bed, instructed his wife to call the Indiana State Police, and proceeded immediately to the store where he met his brother. As Harold began to circle the outside perimeter of the store, he was shot in the leg and fell to the ground. When he looked up, he peered into the distance and saw "somebody trying to go over the fence in the backyard." According to Harold, he attempted to pursue the burglary suspect and:

> "when I got almost to the east end of the building, my brother was down on one knee, holding his gun, and he hollowed [sic], that, he had been hit. I stopped by a telephone booth and telephone pole there, on the east end and some man or boy was running across the neighbor's yard. And I fired a few shots at him. I went over to my brother and asked him if he was alright, he said, just burned."

Harold further testified that once he discovered that his brother had been shot, he:

> "noticed a man or boy running across [Highway] #40,

> going south, and my brother seen him at the same time.
>
> * * *
>
> When I seen him run across #40, I got up and got in my car, put a new clip in my gun, drove across #40, got just a glimpse of a man running behind a house or beside the house."

The Indiana State Police arrived a short time later and Harold informed them that "there was something in the weed patch running, that was carrying a gun, or in that line." Harold returned to his store and "tried to go into the building, which the doors was 'jimmied' and we couldn't get in." The law enforcement officers then placed the wounded Gibson brothers in an ambulance and transported them to a nearby hospital where Edward Gibson later died as a result of his gunshot wound.

Ronald Riner testified that on August 9, 1970, at approximately 10:00 p.m., he, his brother Jack Riner, and their uncle, Wayne Evans, were joyriding around Indianapolis, Indiana in Evans' 1963 Pontiac. Ronald, who was lying down in the back seat, asked Evans to return home because he was getting "sleepy." Ronald fell asleep and the next thing he remembers Evans stopped the automobile, exited the driver's side, and proceeded to the trunk of the car. Evans retrieved a plastic bag from the trunk, and, according to Ronald, it "looked like the butt of a gun, sticking out of the bag ... it was a long gun...." Ronald further testified that Evans returned to the front of the vehicle and asked Jack Riner, "if he would go with him." Jack agreed and "got out of the car." According to Ronald, Evans and Jack Riner "went off west from the car" toward Gibson's Trading Post and he "laid back down in the car." The next thing Ronald remembers is that he:

> "heard some shooting going on, several cars pulling up at a building off to my right. Some people hollering, shouting, then I jumped out of the car and looked back

> over the top of the car and I saw somebody that looked like Wayne running south on U.S. 39, coming towards the car and then he turned east and went toward Plainfield."

Ronald Riner became scared and fled to a nearby field where he remained hidden for approximately one hour before being arrested by two Marion County sheriffs. According to Riner, he informed the law enforcement officer "who was with me. And the last time I had saw [sic] them. And gave them a description." Ronald explained that "Jack Riner, my brother and Wayne Evans, my uncle" were the ones with him.

Deputy sheriff Ramp testified that on August 10, 1970, at approximately 8:00 a.m., he apprehended Jack Riner "about one-half mile east of Belleville on U.S. 40." According to deputy sheriff Ramp, Jack Riner's "trousers were all wet from the knee down and his clothes were all rumpled. That is how I come [sic] to stop him. The conditions [sic] of his clothes and stuff." The record also reveals that Wayne Evans was arrested on August 10, 1970, at approximately 10:30 p.m., on U.S. Highway 40, east of Belleville, Indiana.

Following the presentation of the foregoing testimony of Harold Gibson, Ronald Riner, and deputy sheriff Ramp to the jury, the prosecution questioned Ronald Riner about a jail cell conversation he had with his uncle Wayne Evans, some two weeks after their arrest. The State's Attorney asked Ronald, "what did he say to you, and what did you say to him?" At that point, the defense counsel, who was representing both Jack Riner and Wayne Evans at trial, raised an "[o]bjection, as far as Jack Riner is concerned" because he was not a party to the conversation. The court sustained the objection and admitted the testimony "only as to Wayne Evans." Ronald Riner then testified that in the jail cell conversation:

> "A. [Wayne Evans] told me that, him and Jack, was over to the building, he ask Jack if he would watch

for him, that they were going to try and get into the building. He tried to force open a door, and continued doing so until he heard a car in front of the building. He went to look and there was someone running toward the building and Jack hollored [sic] from the other side that, that was somebody over there. And they said that was when the shooting started.

Q. What did he specifically tell you, Ronald that happened?

A. He just said he was shot at, he shot back he fired several rounds from the ground on the west end of the building. In order to stop the man, then he ran east, from the back of the building. At which time he was confronted on the east end of the building by another man, he began firing at him, he ran across the street and fell, the man started running toward him, fired several rounds at him.

Q. You say, he? You mean Wayne Evans fired?

A. No, sir. The other man fired.

* * *

A. The man that I understand that got killed was doing the firing at the time he fell. He fired several rounds at him, he said. He said he had no alternative, when he got up but to shoot the man, rather than the man to shoot him. At which time he shot twice at him, the man fell forward and he ran south on U.S. 39."

Ronald Riner further testified that in another jail cell conversation, Jack Riner and Wayne Evans approached him and stated that "they didn't think I should testify in this matter, that they felt like that was what it was leading to, was me, turning State's evidence. That they wouldn't like it, and didn't think it was fair." Based upon the totality of the evidence presented at trial, the jury found Jack Riner and Wayne Evans each guilty of the murder of Edward Gibson and the trial judge sentenced each defendant to life imprisonment.

Jack Riner filed a direct appeal of his conviction to the Indiana Supreme Court, alleging, *inter alia*, that he was improperly tried in the Morgan County Circuit Court because he was only sixteen years of age at the time of trial, that Ronald Riner's testimony was incompetent, and that the prosecutor engaged in prejudicial misconduct.[1] At no time did Jack Riner argue before the Indiana Supreme Court that he was denied his Sixth Amendment right to confront and cross-examine witnesses against him. On May 3, 1972, the Indiana Supreme Court affirmed Jack Riner's conviction for the first degree murder of Edward Gibson. *Riner v. State*, 258 Ind. 428, 281 N.E.2d 815 (1972) ("*Riner I*"). On March 29, 1973, Riner filed a petition for writ of habeas corpus in Federal court that was subsequently denied on May 3, 1974. On March 1, 1976, some five-and-one-quarter years after his conviction for the first degree murder of Edward Gibson, Riner filed a motion for post-conviction relief in the Morgan County Circuit Court, alleging for the first time that he had been denied his Sixth Amendment right to confront and cross-examine witnesses against him when Ronald Riner testified about Wayne Evans' jail cell conversation, implicating Jack Riner in the murder of Edward Gibson. The court denied post-conviction relief, finding that Riner had failed to raise the Sixth Amendment claim either at trial or on direct appeal and had thus waived the issue. The Indiana Supreme Court affirmed the denial of Riner's motion for post-conviction relief, ruling that:

> "[t]he post-conviction relief process is not a substitute for direct appeal, but is a process for raising issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. *Bradberry v. State*, (1977) 266 Ind. 530, 364

[1] The record reveals that on October 2, 1970, a change of venue was granted in this case, transferring the first degree murder trial from the Circuit Court of Hendricks County, Indiana to the Circuit Court of Morgan County, Indiana.

> N.E.2d 1183, 1188. Additional review of [Ronald Riner's] testimony on other grounds is not available here in this post-conviction relief procedure and the court properly found against the appellant in that *this issue had been waived.*"

Riner v. State, 271 Ind. 578, 582, 394 N.E.2d 140, 144 (1979) (emphasis added) ("*Riner II*").

On April 15, 1982, Jack Riner filed his present habeas corpus petition in the United States District Court for the Southern District of Indiana, alleging that his Sixth Amendment right to confront and cross-examine witnesses against him was violated when Ronald Riner testified as to his jail cell conversation with Wayne Evans concerning Jack Riner's participation in the murder of Edward Gibson. The district court properly ruled, based upon the controlling case law, that Riner's Sixth Amendment claim was "waived by the failure of petitioner to raise it on direct appeal." The court reasoned that:

> "[p]etitioner here fails to show how he was harmed and substantially prejudiced.
>
> * * *
>
> Evans did not implicate petitioner as the killer but merely as a lookout. Even without this testimony it is clear that Ronald Rider [sic] could place petitioner at the scene of the murder, and had heard Wayne Evans ask for petitioner's assistance. Such evidence, in itself, is enough to establish petitioner as an accomplice and subject to criminal prosecution for felony murder."

The majority now reverses the district court's ruling and holds that Jack Riner has demonstrated sufficient cause and prejudice to overcome the waiver and prevail on the merits of his Sixth Amendment claim.

II

The law is well-settled that "when a procedural default bars state litigation of a constitutional claim, a state

prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice." *Engle v. Isaac*, 456 U.S. 107, 129 (1982). *See also Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). In the present case, the Indiana Supreme Court properly ruled in *Riner II* that Jack Riner's failure to raise his Sixth Amendment claim either at trial or on direct appeal constitutes the procedural default of waiver, barring subsequent litigation of the claim under Indiana law. 271 Ind. at 582, 394 N.E.2d at 144. Thus, in order for Riner to obtain federal habeas relief he must establish cause for and actual prejudice resulting from his failure to raise the Sixth Amendment claim at trial or on direct appeal. This "cause and prejudice" standard is a conjunctive test that requires Riner to establish both cause *and* prejudice if he is to overcome the procedural default of waiver; failure to establish either one of the elements results in a dismissal of his habeas corpus petition.

The district found that:

> "[p]etitioner here fails to show how he was harmed and substantially prejudiced.
>
> * * *
>
> Evans did not implicate petitioner as the killer but merely as a lookout. Even without this testimony it is clear that Ronald Rider [sic] could place petitioner at the scene of the murder, and had heard Wayne Evans ask for petitioner's assistance. Such evidence, in itself, is enough to establish petitioner as an accomplice and subject to criminal prosecution for felony murder."

I agree with the district court judge that Jack Riner has failed to demonstrate that his failure to raise the Sixth Amendment claim either at trial or on direct appeal actually prejudiced his case. In view of this conclusion, I do not reach the issue of whether representation by the same attorney at a criminal trial and on direct appeal constitutes sufficient "cause" to overcome the procedural default of

waiver. Moreover, I do not reach the merits of Riner's claim that the jail cell conversation violated the principles of *Bruton v. United States*, 391 U.S. 123 (1968), depriving Riner of his Sixth Amendment right to confront and cross-examine witnesses against him.

The record reveals that Jack Riner was charged with and found guilty of the first degree murder of Edward Gibson. At the time of Riner's prosecution, Ind. Code Ann. §10-3401 (Burns 1956) provided that "[w]hoever ... in the perpetration of or attempt to perpetrate a ... burglary ... kills any human being, is guilty of murder in the first degree ...." Moreover, Ind. Code Ann. §9-102 (Burns 1956) provided that "[e]very person who shall aid or abet in the commission of a felony ... may be charged by indictment, or affidavit, tried and convicted in the same manner as if he were a principal ...." The majority asserts that "[t]he petitioner was prejudiced because the admission of [Wayne Evans' jail cell] testimony was the only evidence before the jury of the petitioner's involvement in aiding and abetting the burglary and murder." From my independent review of the record, I am convinced that the jury was presented with more than sufficient evidence, before introduction of the jail cell conversation, to find, beyond a reasonable doubt, that Jack Riner aided and abetted in the burglary that resulted in Edward Gibson's death.

According to the evidence presented to the jury, Wayne Evans retrieved a gun from the trunk of his automobile and then approached Jack Riner, asking him "if he would go with him." Jack Riner agreed and "got out of the car." Evans and Jack Riner then "went off west from the car," toward Gibson's Trading Post. At approximately 3:00 a.m. the burglary alarm at Gibson's Trading Post sounded, causing Harold Gibson to rise from bed and proceed immediately to the store. Upon his arrival, Harold was shot in the leg, fell to the ground, and as he looked up he saw "somebody trying to go over the fence in the backyard." Harold hobbled toward his wounded brother and observed

"some man or boy . . . running across the neighbor's yard." Once he reached his brother, Harold "noticed a man or boy running across #40 going south." The law enforcement officers arrived on the scene, apprehended Ronald Riner, and questioned him as to who else was involved in the crime. Ronald informed the officers that "Jack Riner, my brother and Wayne Evans, my uncle" were with him. At approximately 8:00 a.m., deputy sheriff Ramp arrested Jack Riner one-half mile east of Belleville, Indiana on U.S. Highway 40. Similarly, at approximately 10:30 a.m., the law enforcement officers arrested Wayne Evans, who was also traveling east on U.S. Highway 40.

The foregoing evidence establishes that after Wayne Evans retrieved a gun from the trunk of the car, he and Jack Riner left Ronald and proceeded toward Gibson's Trading Post, the scene of the attempted felony burglary and the murder of Edward Gibson. Evans' question to Jack Riner, "if he would go with him," clearly evidences Evans' intent that Jack aid and abet in the armed burglary. Indeed, the fact that Jack Riner freely agreed to accompany Evans evidences Riner's intent to assist in the burglary, as there is no other possible explanation for accompanying the armed Evans to Gibson's Trading Post. It is for this very reason that following the attempted burglary and the murder of Edward Gibson, Ronald Riner informed the law enforcement officers, "Jack Riner, my brother and Wayne Evans, my uncle," were the ones involved in the crime.

Furthermore, a reasonable juror would have considered the fact that Jack Riner not only knowingly and willfully accompanied Wayne Evans to Gibson's Trading Post, but that he also fled the scene of the crime once the shooting began. Harold Gibson testified that as he began to search the perimeter of the store, he was immediately shot in the leg and when he peered into the distance, he observed "somebody trying to go over the fence in the backyard." When Harold hobbled toward his wounded brother, he

again saw "some man or boy ... running across the neighbor's yard." Once he reached his brother on the other side of the building, he "noticed a man or boy running across #40 going south...." Though Harold was unable to identify the person climbing the fence and running through the neighbor's yard or the person running south across U.S. Highway 40, due to the nighttime conditions existing at 3:00 a.m. in the morning, the law enforcement officers apprehended Jack Riner some five hours later, approximately one-half mile from the scene of the crime. Riner's physical appearance revealed that he had been "on the run" for some time. Riner's decision to flee from the scene of the crime when the shooting commenced and his attempt to evade law enforcement officers by running through the farmlands of rural Indiana is a further indication of his participation in the attempted burglary. In view of this evidence, I am convinced that a reasonable juror could find, beyond a reasonable doubt, that Jack Riner aided and abetted in the felony burglary that resulted in the murder of Edward Gibson. Accordingly, I would hold that Wayne Evans' jail cell conversation, simply confirming Riner's participation in the felony burglary, did not prejudice Jack Riner's case. As a result, Riner has failed to demonstrate the prejudice necessary to overcome the procedural default of waiver and the petition for writ of habeas corpus should be denied.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JACK RINER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO.
	)	IP 82-444-C
NORMAN G. OWENS, Superintendent,	)	
Indiana State Reformatory,	)	
	)	
Respondent.	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that said complaint is hereby DISMISSED.

Dated this 3 day of March, 1983.

CALE J. HOLDER

CALE J. HOLDER, *Judge*
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JACK RINER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO.
	)	IP 82-444-C
NORMAN G. OWENS, Superintendent, Indiana State Reformatory,	)	
	)	
	)	
Respondent.	)	

ENTRY

This cause comes before the Court on the amended petition of Jack Riner for writ of habeas corpus, respondent's return to Order to Show Cause, and the expanded record. Petitioner has moved the Court to grant summary judgment and for declaratory judgment in his favor to which respondent has moved for denial. Upon examination of petitioner's motions for summary judgment it appears that petitioner has submitted a self-serving affidavit attempting to set forth ultimate determinations of law as facts. For purposes of this Court's rulings on the case, the court will treat petitioner's motions for summary and declaratory judgments as motions for judgment on the merits.

Petitioner's affidavit in support of his motion and attached exhibits will be applied as a traverse to respondent's return to Order to Show Cause.

Petitioner is currently an inmate at the Indiana Reformatory at Pendleton, Indiana, serving a life term for a murder conviction in 1971 from the Circuit Court of Morgan County, Indiana. Petitioner has raised two grounds for review:

1. He was denied his constitutional right to confrontation under the rule of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968); and

2. The State of Indiana waived its waiver defense.

Respondent has urged the Court to deny relief and dismiss the petition for failure to exhaust available state remedies, as required under the doctrine of *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198 (1982).

This action was originally submitted as a request to proceed in forma pauperis on March 23, 1982. An order to show cause was issued on May 19, 1982. The United States Supreme Court issued the *Rose v. Lundy* opinion on March 3, 1982. While it is entirely possible that petitioner was unaware of the holding in *Rose v. Lundy* prior to his filing of request for habeas relief, such fact does not control this Court's decision today.

Upon review of the expanded record, the Court finds that on the original appeal of petitioner's conviction to the Indiana Supreme Court in *Riner v. State*, 258 Ind. 428, 281 N.E.2d 815 (1972), there was no presentation of the confrontation claim and such issue was not considered by the Court in its opinion. However, in 1976, petitioner filed a petition for post-conviction relief with the Morgan Circuit Court setting forth as one of his allegations that his rights to confrontation had been violated. The Judge who ruled on the post-conviction relief petition agreed that had the confrontation issue been properly presented on appeal it was likely a new trial would have been granted. The Court declined to grant a new trial to petitioner, holding that petitioner had waived his claim on confrontation by not including it on appeal. Petitioner then sought review of the post-conviction relief denial to the Indiana Supreme Court, but failed to present the denial of the right to confrontation to the Indiana Supreme Court, although such issue was mentioned as a specification of error as to ineffective assistance of counsel. The Indiana Supreme Court held that

the issue of confrontation had been waived by the failure to present it on direct appeal, but that the Supreme Court would not review such claim during the post-conviction relief procedure. *Riner v. State*, ____ Ind. ____, at ____, 394 N.E.2d 140, 144 (1979). Since it appears that any attempt to resubmit the issue as to confrontation in the form of a post-conviction petition would prove futile in this case, this Court finds that petitioner has exhausted his available state remedies as to the two issues presented here.

I.

Petitioner was convicted of first-degree murder and sentenced to a life term in 1970. Testimony presented at trial established that petitioner, his brother, Ronald Riner, and an uncle, Wayne Evans, had been driving in an automobile near Terre Haute, Indiana. Ronald Riner, upon his testimony as a state's witness, stated that he was asleep in the back seat of the car which was stopped and that Evans got out. Evans then removed a plastic bag from the trunk and asked Jack Riner to accompany him. At that point Ronald laid back down in the back seat. Ronald testified that he heard some shots fired and noticed several cars pulling up near a building. Ronald got scared, left the car, and ran into a field to hide. The three were later apprehended by police. Although the decedent's brother arrived at the scene of the crime and observed two figures leaving the area, he could not identify either person.

At the trial Ronald Riner was asked to testify about a conversation between Wayne Evans and himself. He stated that Wayne told him that Jack was to act as a lookout while Wayne tried to break into the building. Wayne reported to Ronald that it was he, Wayne, who had returned fire at the store owner. According to Ronald's testimony, Wayne Evans committed the crime and Jack Riner acted only as a lookout.

Petitioner and Wayne Evans were represented by the same counsel at trial. At the time Ronald's testimony was

proffered, counsel for petitioner objected on the grounds that the testimony was inadmissible hearsay as it related to petitioner. That objection was sustained. Petitioner here argues that his right to confront witnesses was violated in that petitioner had no opportunity to cross-examine his co-defendant Wayne Evans as to the validity of any statements made by Evans to Ronald Riner. Petitioner cites *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968) in support of his theory.

While the conversation between Ronald Rider and Evans is clearly admissible as to Evans, that segment which implicates Jack Riner may not be since petitioner could not force Evans, his codefendant, to the stand for purposes of cross-examination. There are two considerations for this Court with regard to this claim for relief. First, did petitioner waive this error by failure to present it on direct appeal and second, was such error of sufficient magnitude to invoke federal relief?

First, this Court agrees with the finding that the issue was waived by the failure of petitioner to raise it on direct appeal. Federal courts have been mindful of the need to safeguard state procedures. The adherence to established appellate procedures promotes the efficient review of alleged errors at trial and permits the errors to be viewed in context and not as separate incidents, each sufficient in themselves to require reversal. Furthermore, not every error occurring at trial mandates vacation of a conviction. The standard used by our courts is that of "cause and prejudice", that the claimed error actually caused substantial harm to the petitioner in depriving him of a fair trial. *See, Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). In order to meet this burden, petitioner must show what actual harm was caused him by the alleged error. Petitioner here fails to show how he was harmed and substantially prejudiced.

The portion of the trial transcript relevant reads:

> He told me that, him and Jack, was over to the building, he ask Jack if he could watch for him, that they were going to try and get into the building. He tried to force open a door, and continued doing so until he heard a car in front of the building. He went to look and there was some one [sic] running toward the building and Jack hollored [sic] from the other side that, [sic] there was somebody over there. And they said that was when the shooting started.
> (Tr. at 828)

The only reference to petitioner is that Wayne Evans asked Jack Riner to watch for him. All other conversations with Wayne Evans were made in the presence of petitioner.

This Court fails to see how petitioner was unduly prejudiced by the testimony of Ronald Rider as to the conversation between himself and Evans out of the presence of petitioner.

Evans did not implicate petitioner as the killer but merely as a lookout. Even without this testimony it is clear that Ronald Rider could place petitioner at the scene of the murder, and had heard Wayne Evans ask for petitioner's assistance. Such evidence, in itself, is enough to establish petitioner as an accomplice and subject to criminal prosecution for felony murder. Indeed, Ronald Rider himself originally faced criminal prosecution, but charges were later dismissed against him. A different result may have occurred had Wayne Evans implicated petitioner as the actual killer and instigator, but Evans' re-telling of the incident to Ronald provided no more basis for conviction that petitioner faced in the absence of the disputed testimony. Thus, this Court finds no substantial prejudice caused defendant by the introduction of such testimony. Furthermore, the Court sustained the objection as to the consideration of the testimony as it related to petitioner and admonished the jury to disregard such testimony as it related to petitioner.

II.

Petitioner's second claim is that the State "waived its waiver defense." In *Riner v. State*, ____ Ind. ____, 394 N.E.2d 140 (1979), the Indiana Supreme Court determined that Mr. Riner had waived appellate consideration of the confrontation issue by failing to raise the issue on direct appeal. Generally, Indiana courts will not consider as grounds for post-conviction relief any issues that may have been asserted on direct appeal.

At the hearing on petitioner's post-conviction relief petition, the State introduced evidence relative to the prosecution of Ronald Rider and the circumstances surrounding Ronald Rider's decision to testify at petitioner's trial. Petitioner argues that the State, by doing so, revived the issue of confrontation for appellate purposes. On appeal of the denial of petitioner's post-conviction petition, the Indiana Supreme Court held that the issue of confrontation had not been revived and that petitioner had waived presentation of the issue by failing to follow state appellate procedures.

Petitioner further argues that his counsel was ineffective in failing to properly follow procedures for review of the confrontation issue.

Whether petitioner waived the issue for appeal or not is a matter for state court determination. *See, United States ex rel., Burnett v. People of the State of Illinois*, 619 F.2d 668 (7th Cir. 1980). However, a federal court may grant habeas relief in light of a procedural default at the state appellate level only upon a showing of actual "cause and prejudice." *Engle v. Isaac*, ____ U.S. ____, 102 S.Ct. 1558 (1982).

Petitioner here has failed to show sufficient "cause and prejudice" as a result of Ronald Rider's statement that petitioner was asked to serve as a lookout while Evans robbed the store.

Even if that statement had never been made, Ronald Rider was able to place petitioner at the scene of the homi-

cide and had heard Evans ask for Jack Riner's assistance. As stated above, such evidence, independent of the hearsay evidence implicating petitioner, was enough to support a finding that petitioner was a participant in the crime. Petitioner has failed to show substantial prejudice by this inadvertant mention of this hearsay testimony which would have persuaded a finding of guilty by the jury more so than if such mention had never been made.

It must be noted that this is petitioner's third attempt at habeas relief. Although federal courts must treat *pro se* litigants liberally and with a fair amount of patience, such is not a basis to allow *pro se* litigants to flood the court with unintelligible paperwork. This Court makes every effort to assist *pro se* petitioners in presenting legitimate claims in a clear, understandable fashion. Although petitioner may, in his own mind, believe he is furthering his cause by the submission of unnecessary and illogical pleadings, in reality, petitioner is adding to the delay in the consideration of his claims. Such practice borders on abuse of the writ.

Therefore, petitioner's request for writ of habeas corpus is DENIED and this cause is DISMISSED.

Dated this 3 day of March, 1983.

CALE J. HOLDER

CALE J. HOLDER, *Judge*
United States District Court
Southern District of Indiana

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IN THE

SUPREME COURT OF INDIANA

JACK RINER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 277 S 146
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MORGAN COUNTY CIRCUIT COURT
The Honorable James M. Dixon, Special Judge

PIVARNIK, J.

The defendant-appellant, and his uncle, Wayne Evans, were indicted for first-degree murder in the death of Edward M. Gibson, on August 10, 1970, in Hendricks County, Indiana. The cause was transferred on motion for change of venue to the Morgan Circuit Court where both defendants were tried by jury, found guilty, and sentenced

to the Indiana State Prison for life. Riner was a sixteen-year-old juvenile at the time of his trial. This Court affirmed the convictions, *Riner v. State*, (1972) 258 Ind. 428, 281 N.E.2d 815. Appellant subsequently filed a pro se "petition for writ of habeas corpus by person in State custody" in the United States District Court, Northern District of Indiana, on March 29, 1973, which petition was denied on April 3, 1974. On March 1, 1976, defendant filed a *pro se* petition for post-conviction relief and motion for change of judge. Defendant was represented by the office of the Public Defender of Indiana, and after some amendments to his post-conviction petition and extensions of time for filing briefs in this Court, four issues were presented to us for review concerning:

1. whether the defendant intelligently had waived his right to separate counsel and separate trial from his co-defendant Wayne Evans;

2. whether the defendant's trial and appellate counsel was ineffective;

3. whether the defendant had waived the determination of the issue of whether his Sixth Amendment right to confront his accusers was violated at trial, and

4. whether the defendant received a fair and impartial hearing on his petition for post-conviction relief.

I.

Both defendant and his uncle, Wayne Evans, were represented by attorney William Erbecker at trial and on appeal of the original conviction. Attorney Erbecker was not called as a witness at the post-conviction hearing. Appellant testified at the post-conviction hearing that he was made aware of the fact that he had a right to demand or request a separate trial from Wayne Evans and had discussed it with his attorney. He decided to proceed with the joint trial and was advised by his attorney that it would

be to his advantage to do so. The trial judge at the post-conviction hearing found that the defendant made an intelligent waiver of his rights to separate counsel. Defendant raised no objection about the joint trial until he filed his post-conviction motion in 1976. The trial judge is a finder of fact at a post-conviction relief hearing. In *Cushman v. State*, (1978) ___ Ind. ___, 378 N.E.2d 643, 644, we stated: "The judge hearing the petition is the sole judge of the weight of the evidence and the credibility of the witnesses. *Carroll v. State*, (1976) ___ Ind. ___, 355 N.E.2d 408. His decision will be set aside only upon a showing that the evidence is without conflict and leads unerringly to a result not reached by the trial court."

The representation of two co-defendants by one attorney is not per se evidence of ineffective representation. *Martin v. State*, (1974) 262 Ind. 232, 314 N.E.2d 60. If there was no objection at trial to such as procedure, the defendant must show that he was actually prejudiced by the joint representation. *Stoehr v. State*, (1975) 263 Ind. 208, 328 N.E.2d 422. There is no error in the trial judge's finding that the defendant had intelligently considered and waived his right to separate trial.

II.

Appellant next claims that his trial and appellate counsel was ineffective. He claims that at trial counsel failed to object to certain remarks by the prosecutor and to State's witnesses presented. He claims that his appellate counsel, who was the same attorney as his trial counsel, failed to preserve and argue an issue on appeal. These issues were considered in appellant's appeal as then presented by his appellate counsel. *Riner v. State*, (1972) 258 Ind. 428, 281 N.E.2d 815. Appellant is attempting to raise the same basic issues by alleging different grounds and combining them with a claim of ineffective assistance of counsel.

The trial court found that defendant's attorney was adequate and effective. There is a strong presumption that

counsel was adequate and effective. Isolated mistakes or poor tactics and strategy do not constitute inadequate representation unless the trial was a mockery of justice. *McFarland v. State*, (1978) ___ Ind. ___, 381 N.E.2d 85, *Blackburn v. State*, (1973) 260 Ind. 5, 291 N.E.2d 686. The presumption of adequacy can be overcome only by strong and convincing evidence. *Roberts v. State*, (1977) ___ Ind. ___, 360 N.E.2d 825. The State points out that the record of the post-conviction hearing reveals that the original trial transcript of the cause was over eleven hundred pages. Countless objections were made for both parties represented by Mr. Erbecker. Mr. Erbecker has been a member of the Indiana State Bar for many years and has participated in countless criminal trials as a defense lawyer. He filed a 164 page brief on appeal in this case and at no point in the proceedings did the appellant object to his representation.

There was sufficient evidence to support the Court's finding that the appellant's representation was adequate.

III.

Appellant's older brother, Ron Riner. was also charged with the murder of Gibson, along with appellant and Wayne Evans. Ron Riner agreed to testify for the State and was not tried with the other defendants. Ron Riner testified that he was asleep in the car at the time they stopped at the store to burglarize it and testified that Wayne Evans told him that when Evans returned to the automobile, he had asked Jack Riner, the appellant, to act as a lookout while he went into the store. Attorney Erbecker objected to this testimony as it applied to appellant Riner and the objection was sustained. Ron Riner was cross examined extensively. Wayne Evans was not called to testify about this statement. We note that even if appellant had had separate counsel, and had had a separate trial, however, there would have been no way for counsel to compel Evans to testify about the statement in question. Neither can we know what Wayne Evans' testimony would have been in this regard.

The issue of Ronald Riner's testimony was raised on appeal in a claim that the prosecuting attorney had allowed him to testify evasively and untruthfully to the knowledge of the prosecutor. This Court found that there were no grounds in that allegation and further found that since appellant had not made that objection during trial, he had waived other contentions as to that testimony. *Riner v. State*, (1972) ___ Ind. ___, 281 N.E.2d at 818.

Appellant did not raise his Sixth Amendment right to confront witnesses as an issue in regard to this same testimony until his post-conviction relief petition.

The Indiana Post-conviction Relief Remedy Rules provide under Ind. P.C.R. 198 as follows:

> "Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition."

In Dull v. State, (1978) ___ Ind. ___, 372 N.E.2d 171, we found:

> "[w]here neither the record nor appellant's brief revealed any proffered basis or circumstance which would satisfactorily mitigate appellant's failure to pursue or perfect a remedy through the normal procedural channels the legal validity of the waiver defense presented was unrebutted and appellant's issues were waived."

The post-conviction relief process is not a substitute for a direct appeal, but is a process for raising issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. *Bradberry v. State*, (1977) ___ Ind. ___, 364 N.E.2d 1183, 1188. Additional review of this same testimony on other

grounds is not available here in this post-conviction relief procedure and the court properly found against the appellant in that this issue had been waived.

IV.

Finally appellant states that he was denied his right to a fair and impartial evidentiary hearing on his petition for post-conviction relief because the prosecuting attorney testified falsely and prejudicially. At the post-conviction hearing, the prosecuting attorney testified that at the original trial, Ronald Riner was given a separate trial and testified as a State's witness. He testified further that Riner had asked for immunity to give this testimony, but that the State had refused to grant it. He said that Riner was later discharged but it was not in return for his testimony. The appellant further shows that during the original trial, witness Ronald Riner testified that it was his understanding that he had been granted immunity for his testimony for the State.

At first blush we must say that this conflict does not make valid appellant's claim that he, therefore, did not receive a fair and impartial hearing. The resolution of this conflict and its effect on the decision was one to be resolved by an assessment of the credibility of the witnesses by the trial court. It does not appear that the appellant informed the trial judge at the post-conviction relief hearing that Ronald Riner had, in fact, testified in conflict with the prosecutor's statement.

We further note that in the original appeal, one of the contentions of the appellant before this court was that Ronald Riner's testimony was incompetent because he was *not* offered or granted immunity and there was no showing that there was compliance with the Indiana immunity statute. Ind. Code §31-1-31-7 (Burns 1971), and therefore Riner should not have been permitted to testify. The opinion then emphasized that the benefits of immunity are personal to the party who furnishes State's evidence and

not to the appellant. We point this out to show that this issue was before the Court on the original appeal. At that time all seemed to agree that no immunity had been granted to the witness or his testimony. The statement of the witness that it was his understanding that he was granted immunity was also before all of the parties. The question of Ronald Riner's credibility against all others was at issue. Apparently there was a conflict in testimony at the original trial, and in testimony before the court in the post-conviction relief hearing with testimony in the original trial transcript. However, there is no issue presented for this Court to decide. Determining the credibility to be given to a witness is the task of the trial court. *Cushman v. State*, (1978) ___ Ind. ___, 378 N.E.2d 643.

Finding no reversible error, we affirm the trial court.

Civan, C.J., Hunter, J., and Prentice, J., concur.
DeBruler, J., concurs in result.

EDITOR'S NOTE

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

* * * * *

Case Number 85-1061

NORMAN C. OWENS, Superintendent,
Indiana Reformatory,

Petitioner,

vs.

JACK RINER,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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NORMAN C. OWENS, Superintendent,
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Petitioner,

vs.

JACK RINER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Jack Riner, respectfully prays that the Petition for Writ of Certiorari, filed by the State of Indiana herein, be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Was the representation by a single attorney of Respondent and a co-defendant in their joint trial for First Degree Murder in the State courts of Indiana and on direct appeal sufficient "cause" for allowing the Respondent to raise a confrontation issue under Bruton v. United States, 391 U.S. 123 (1968) in this federal habeas corpus petition when that attorney failed to object on "Bruton" grounds to a statement incriminating Respondent, allegedly made by the other jointly represented defendant, introduced in evidence at the joint trial and when the same attorney failed to raise such "Bruton" issue on appeal to the Indiana Supreme Court?

2. Was the introduction of the jail-house statement harmless error when it was the only evidence adduced at trial which suggested that Respondent had participated in the robbery?

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, STATEMENT OF THE CASE

Respondent accepts these portions of the Petition for Writ of Certiorari filed herein. Additional and supplemental facts will be stated in the body of the argument herein.

REASONS WRIT SHOULD BE DENIED

THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WHICH ARISES IN AN UNUSUAL FACTUAL SETTING, IN A CASE TRIED MORE THAN FIFTEEN YEARS AGO.

A. There was Ample Basis for the Court of Appeals to Find "Cause" for not Raising the Confrontation Issue in the State Courts under the Unique Facts of this Case.

The Respondent, who was fifteen years old at the time, is alleged to have assisted his uncle, Wayne Evans, in committing the burglary of a store in the early morning hours of August 10, 1970. During the burglary Edward Gibson, one of the owners of the store, was killed. Respondent's culpability for the murder is based upon the theory that he aided and abetted his uncle's commission of the burglary and was thus responsible for the consequences thereof, including the death of Gibson. Respondent's brother, Ronald Riner, was also initially charged with the crime.

Respondent and Evans were tried jointly, represented by the same attorney. At trial Ronald Riner testified that while he and Evans were confined in jail prior to trial, Evans told him that Respondent had assisted in the burglary. No objection based on Bruton v. United States, 391 U.S. 123 (1968) was made by the attorney representing both defendants, although an unspecified objection (see, p. 9 of Petition) as to Respondent was sustained by the trial court*. Neither Respondent nor Evans

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* In Bruton this Court explicitly held that an objection based on hearsay was inadequate to protect the confrontation rights of a defendant, at 391 U.S. 128-129.

testified at trial and the jury was not admonished as to its use of the jail-house, hearsay statement.

The attorney representing both Respondent and Evans devoted virtually his entire closing argument for the defense by attacking the credibility of Ronald Riner (State Court Record, pp. 1094-1107). At no point did counsel for the two defendants point that that the statement was not even admissible as to Respondent; no jury instruction or admonition on this issue was requested or given. Indeed, throughout his closing argument counsel attempted to evoke the sympathy of the jury for both Respondent and Evans by constantly referring to Respondent's youth. Thus counsel clearly used Respondent's age to assist Evans, without ever differentiating the difference in evidence against his two clients. Had this conflict not existed and if Respondent was represented by separate counsel, and have the trial of the two defendants not been severed, independent counsel would certainly have hammered away at the lack of any evidence implicating Respondent sufficient to convict him as a party to the burglary or consequential murder. Counsel for Respondent had no need to attack Ronald Riner's credibility because Ronald's testimony of the hearsay statement was not admissible as to Respondent, and was so found by the trial court.

The same attorney was appointed to appeal both Evans' and Respondent's convictions to the Indiana Supreme Court. The cases were briefed and considered together, raising only the issue of Ronald Riner's credibility and competency, Riner v. State, 281 N.E.2d 815 (Ind. 1972). Again, no Bruton issue was raised and no effort was made to distinguish between the use of the statement as to the two defendants. Both convictions were affirmed. The charges against Ronald Riner were ultimately dismissed.

When the Respondent subsequently was represented by new counsel, the Indiana courts concluded that the Bruton issue had

been waived and could no longer be raised in State court.

It is in this unusual factual context that the Court of Appeals found that Respondent had demonstrated "cause" for not raising the confrontation issue either at trial or on direct appeal. Contrary to the suggestion made by Petitioner (Petition, p. 12) the Court below did not adopt a per se rule finding that "cause" existed merely because there was joint representation. Here the Court found that the single attorney representing both Respondent and Evans had an actual conflict which prevented him from making the proper objection or raising the issue on direct appeal. The jail-house statement by Ronald was actually helpful to counsel's representation of Evans, while highly prejudicial to Respondent. In the hearsay statement Evans asserted that he had fired the shots only after being shot at himself, thereby raising the suggestion of self defense. Unfortunately, since the Respondent is alleged to have aided and abetted the burglary and murder his culpability was established by other parts of this same statement, if the hearsay was believed by the jury.

Petitioner seeks to convert this essentially fact-bound case, tried more than fifteen years ago, into a vehicle to resolve issues which are not presented. It is highly unlikely that any court would allow an attorney, even a retained attorney, to represent two defendants in a joint trial in a capital case in which there is a statement which is a classic violation of Bruton.

The best Petitioner's can do is seize upon JUDGE FLAUM's use of the word "possibility" (Petition, p. 12) to suggest that the Court below misapplied the law. This is an unfair and exceedingly disingenuous reading of the panel's decision. The panel found that the attorney representing both defendants had a conflict which prevented him from raising the confrontation issue at trial and certainly from raising that issue on appeal.

The Court of Appeals' resolution of this issue was

entirely consistent with the law and common sense. The impropriety of a single attorney representing the two defendants in this type of case, both at trial and on appeal, is obvious. The legal question is pellucid--this hearsay statement violated Bruton. Counsel used the inadmissible statement to Evans' advantage, but to Respondent's detriment. By allowing the cases to be tried jointly counsel was able to use Respondent's youth to benefit Evans, while clearly prejudicing Respondent. The fact that Indiana does not provide an alternative vehicle for raising this issue collaterally, while unfortunate, leaves Respondent no other remedy but that provided in 28 U.S.C. sec. 2254. He amply demonstrated "cause" for the state procedural default as required by Wainwright v. Sykes, 433 U.S. 72 (1977) and its progeny.

B. The Hearsay Statement was the Only Evidence Sufficient to Convict this Respondent of Any Offense.

Petitioner argues, first that Respondent was not prejudiced by the admission of the hearsay statement given by Wayne Evans to Ronald Riner, and, secondly, that the admission of this evidence was harmless beyond a reasonable doubt. Both of these arguments relate to the assertion that there was sufficient evidence of Respondent's guilt without considering the jail-house, hearsay statement.

As an initial proposition, it is manifest that the testimony of Ronald Riner, as to a statement given him by Wayne Evans, introduced in a joint trial of Respondent and Evans, in which neither testified, is a classic violation of Bruton. The Petitioner makes no argument to the contrary.

Petitioner, relying on the opinion of the dissenting judge in the Court of Appeals, argues that absent the hearsay testimony of Ronald Riner, there was sufficient evidence to convict Respondent at trial. Respondent asserts this is simply incorrect.

Without the testimony of Ronald Riner of what Wayne Evans

allegedly told him in the jail there was no evidence upon which any trier of fact could conclude that the Respondent aided or abetted the offense. There is no evidence, other than this hearsay, which suggests that Respondent acted as a lookout, entered the store, stole anything, or in any way furthered the outcome of the offense. There is no evidence that Respondent knew of his uncle's plan, approved of it, or desired to assist in the criminal activity. At best the evidence emphasized by Petitioner at pages 18 and 19 of the Petition puts Respondent at the crime scene. Contrary to Petitioner's submission, there is no evidence, other than Ronald's hearsay testimony, that the Respondent participated in the offense. While there is testimony that two people ran from the area of the store, there is no evidence that two people committed the crime or that Evans was assisted in the crime by anyone. Harold Gibson did not testify that two people were in the store or that two people were involved in the burglary. His only statement referring to two people was that he saw two figures running from the area of the store. Ronald's hearsay declaration did not corroborate any evidence on this point; it was the only evidence supplying the essential element of Respondent's actual participation in the offense.

Without evidence of actual participation, mere presence at the scene of the crime is not sufficient under Indiana law to sustain a conviction, Janigon v. State, 429 N.E.2d 959, 960 (Ind. 1982). "In order to find that a person aided and abetted another in the commission of a crime, it is necessary that he associate himself with the unlawful venture, that he participate in it with desire of accomplishment, and that he seek by his action to make it succeed," Peterson v. United States, 405 F.2d 102, 109 (8th Cir. 1969). Even if the bystander knows and approves of the crime being committed, he does not become liable as an aider and abettor unless he makes known to the principal that he shares his purpose, actually undertakes an act of

assistance, or makes known to the principal that he will assist if necessary, 1 Torcia, Wharton's Criminal Law, §31, p. 166.

In this case the testimony of the surviving victim does not establish that two persons committed the offense, only that two people were running from near the scene. Under the facts here, it is just as likely that the second person was Ronald Riner and not the Respondent. Moreover, other than the Ronald Riner hearsay of the jail conversation with Evans, this record is absolutely and totally devoid of any evidence whatsoever that this Respondent undertook any action to assist in the commission of the offense, that Respondent shared Evans' criminal intent, or that he, in any way, made known that he would assist in the commission of the crime. Viewing this record most favorably to the prosecution and giving Petitioner every reasonable doubt in this record, the fact remains that the redacted evidence, absent the objectionable statement, at best puts Jack at the crime scene. There is no other evidence of Jack's actual involvement in the commission of the offense. No reasonable jury could have properly convicted this Respondent of murder, absent this hearsay, even if there was evidence that this Respondent went with his uncle, while his uncle was carrying a weapon, a fact Respondent contests. Absent untainted evidence of Respondent's involvement in the offense, which simply does not exist, this conviction could not be sustained, even if Respondent ran from the crime scene after the shots were fired.

CONCLUSION

The Court of Appeals carefully considered each of the arguments now advanced by Petitioner, both initially and on rehearing. The Court considered the unusual facts of this case and correctly followed the law. This case raises no broad question of law to warrant this Court's review nor was the Court of Appeals incorrect in its resolution of the issues raised. There is no reason for the Court to exercise its discretion to review this case.

For the reasons argued herein, Respondent respectfully prays that the Petition for a Writ of Certiorari to the United States court of Appeals from the Seventh Circuit be denied.

Respectfully submitted,

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